SUPREME COURT, U. S.

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FILED
JUL 20 1968
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term 1968
No. 326

SAMSON MARKET COMPANY, INC.,
a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, DIRECTOR OF
THE DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA,

Appellees.

Appeal from the Decision of the Court of Appeal of the State of California, Second Appellate District, Division One, 2nd Civil No. 32647 and of the decision of the California Supreme Court

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRIOR PROCEEDINGS

This is an appeal by a retail liquor licensee from the decision of the Court of Appeal, Second

Appellate District, Division One, on April 26, 1968, reported in 261 A.C.A. 659. The opinion of the Court of Appeal is appended hereto as Appendix "A". A petition for hearing to the California Supreme Court was denied on June 19, 1968, without opinion.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOLVED

This is an appeal pursuant to 28 United States Code §1257(2).

Samson Market Company (hereinafter referred to as Samson) filed an original Petition for Writ of Mandate in the Court of Appeal, Second Appellate District, State of California on January 12, 1968. Said Court, after hearing, denied the petition on April 26, 1968. A petition for hearing to the California Supreme Court was denied on June 19, 1968.

Notice of Appeal was filed on July 2, 1968 in the Court of Appeal, Second Appellate District, State of California, said Court being the highest State Court in which a decision could be had and the court possessed of the record.

The federal questions were raised initially in the Petition for Writ of Mandate at page 8 of the Points and Authorities and page 3 of the petition for hearing to the California Supreme Court.

STATUTES INVOLVED

Rule 65(d), California Administrative Code, Title IV, which states:

> "(a) Every licensee who surrenders, abendons or quits his licensed premises, or who closes his licensed business for a period exceeding 15 consecutive calendar days, shall, within 15 days after surrendering, quitting, or abandoning his licensed premises, or closing his licensed business, surrender his license or licenses to the department. The department may seize the license certificate or certificates of any licensee who fails to comply with the surrender provisions of this rule, and may immediately cancel his license or licenses.
>
> "(b) The premises from which a license has been surrendered, abandoned, transferred, canceled or revoked may be relicensed upon proof satisfactory to the department that the former licensee has relinquished all right to possession of the licensed premises.
>
> "(c) A surrendered license may be reinstated upon request made at least 10 days prior to the date of reinstatement upon certification by the licensee that there has been no change of ownership of the licensed business, and that the premises possess the same qualifications

required for the original issuance of the license.

"(d) Any license voluntarily surrendered under subsection (a) of this rule shall be canceled if it is not transferred to another person or for use at another premises, or redelivered and the licensed activity resumed, within six months from the date of such surrender unless the period is extended by action of the department.

"(e) Any licensee whose license has been surrendered pursuant to this rule may sell his stock of alcoholic beverages upon application to the department as provided by rule." Title IV, California Administrative Code, §65.

That portion of Article XX, Section 22 California Constitution which states:

"The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for

good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State."

STATEMENT OF FACTS

SAMSON was a licensee of the Department of Alcoholic Beverage Control (hereinafter referred to as "Department") authorized to sell alcoholic beverages.

On July 31, 1967, the lease under which Samson held its licensed premises expired and the landlord refused to renew the lease. Therefore, on July 25, 1967, Samson surrendered its license to the custody of the Department as required by subparagraph (a) of Rule 65.

On December 13, 1967, Samson opened an escrow for the sale of its license for $17,250.00 to a purchaser who intended to conduct a retail liquor business in Covina, California. On the same day, Samson made a request by letter to the Department that the time for cancellation of the license be extended for a period of 90 days, pursuant to subparagraph (d) of Rule 65, in order to permit the proposed sale to take place and to

afford the Department an opportunity to consent to the transfer.

On December 21, 1967, the Department informed Samson by letter that its request for an extension of time was denied. The letter also stated,

> "We must also remind you that a license cannot transfer to another person while there are pending accusations against the license. We must further caution you that licenses surrendered pursuant to Rule 65 must be reactivated prior to determination of the six (6) month period provided or be subject to cancellation."

On January 30, 1968, the Department denied a request from petitioner that the cancellation date be extended indefinitely until the disciplinary actions were resolved or until consent to the transfer of the license was obtained.

At the time said letters were written there were three outstanding disciplinary matters pending against Samson before the Department. In one of the pending disciplinary actions the Department had ordered Samson's license suspended for a period of ninety days; in the other two disciplinary actions the Department had ordered the license revoked. At the present time one matter (the suspension) is pending before the Alcoholic Beverage Control Appeals Board, one matter is pending before the California Supreme Court which has granted a Writ

of Review, and one matter is before this Court as Samson v. Kirby, No. 1519, Oct. Term 1967.

On January 9, 1968, Samson filed an original petition for Writ of Mandate in the Court of Appeal for the State of California. In its petition, Samson asked the Court to order the Department to extend the period of time for cancellation of its license for a reasonable period of time after the pending accusations against its license were ultimately determined or until such time as the Department consented to the transfer of said license to other persons.

Samson's license would have been cancelled pursuant to subsection (d) of Rule 65 on January 25, 1968. No stay order was issued by the California courts with respect to cancellation of the license. However, by declaration dated February 21, 1968, the Department advised the Court of Appeal that the Department had not extended the cancellation date of the license but that it intended to retain the status quo as to the license pending the litigation before the Court of Appeal.

QUESTIONS PRESENTED

1. Is the cancellation of Samson's license under Rule 65(d) without a hearing and under the facts of this case so arbitrary and capricious as to amount to a denial of property without due process of law?

2. Was the refusal of the Department to extend the period of time on which to cancel the license so arbitrary and capricious as to amount to a denial of property without due process of law?

THE QUESTIONS ARE SUBSTANTIAL

The horns of the dilemma may be stated briefly. If Samson is successful after a tremendous expenditure of time, effort and funds in its appeals now pending before the California Supreme Court and this Court, is it to be denied the fruits of its victory by the accident of cancellation of its license?

Samson, when it lost its lease did exactly what the law required. It surrendered its license. The refusal of the Department to extend the time for cancellation of the license or to consent to a transfer because of the pending matters on appeal allows the Department to accomplish indirectly what it may not be able to do directly -- cause the loss of the license.

ARGUMENT

I

Rule 65(d) of Title IV, California Administrative Code provides that any license surrendered pursuant to Rule 65(a) shall be cancelled if it is not transferred within 6 months unless the period for cancellation is extended by the Department.

The cancellation is mandatory, not directory, and no provision for hearing or notice is provided to the licensee prior to the cancellation.

The powers of the Department derive from Article XX, Section 22 of the California Constitution which gives the Department the power to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting of continuance of such license would be contrary to public welfare or morals.

Nowhere in the California Constitution is there given any basis or authority for "cancellation" of a license for non-use.

The limitations on the power of the department to deny, suspend or revoke are clearly contained in the phrase "contrary to public welfare or morals". Such power is not an arbitrary power and a suspension or revocation must be based on good cause and sufficient evidence.

Torres v. Department of Alcoholic Beverage Control, 192 Cal. App. 2d 541, Harris v. Alcoholic Beverage Control, 62 Cal. 2d 589 and 204 Cal. App. 2d 729. How is continuance pending matters on appeal contrary to public welfare or morals? No answer to the question will appear in the record of this case because no hearing has ever been held.

If, indeed, the continuation of a license past the six month period is grounds for revocation (akin to cancellation) the licensee should be given an opportunity to defend itself in a hearing and the Department should, at the very least, be required to prove that the continuation of the license would be contrary to public welfare and morals and Samson should, at the very least, be given an opportunity to be heard and refute the charge.

Under Rule 65(d) as it now stands the Department has the unfettered power, without hearing or justification, to cancel a license simply because a six month period has expired.

The traditional concepts of fair play and justice inherent in the Due Process Clause of the Fourteenth Amendment of the Constitution require this Court to fetter the arbitrary action of the Department. Without cause or justification a valuable property right has been taken from petitioner merely because it obeyed the law in surrendering its licensee and because three matters were pending against it.

Samson has labored long and hard in

prosecuting and protecting its rights under the law. It has incurred the expense of appeals to this Court and the California Supreme Court and is willing to base the loss of its license on the determination of those cases. To lose its license on the basis of the trap it fell into in surrendering its license is unjust. It is respectfully submitted that the traditional concept of justice requires summary reversal of the decision of the California courts.

Respectfully submitted,

JACQUES LESLIE

LAWRENCE TEPLIN

Attorneys for Appellants

APPENDIX "A"

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

SAMSON MARKET COMPANY, a California corporation, Petitioner, v. EDWARD J. KIRBY, DIRECTOR OF THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondents.	2d Civil No. 32647 Court of Appeal - Second Dist. FILED Apr. 26 1968 Clay Robbins, Jr. Clerk

PROCEEDING in mandate to compel director of Department of Alcoholic Beverage Control to extend time for cancellation of liquor license of petitioner.

Leslie and Rubin and Lawrence Teplin for Petitioner.

Thomas C. Lynch, Attorney General, and

Kenneth Scholtz, Deputy Attorney General, for Respondents.

This is a proceeding for a writ of mandate to respondent, the director of the Department of Alcoholic Beverage Control, "to extend the period of time for cancellation of the liquor license of petitioner for a reasonable period of time after such time as the pending accusations against the license are ultimately determined, or until such time as the Department consents to the transfer of said license to other persons." Upon the filing of this petition we issued our alternative writ to determine whether this Court or the superior court has jurisdiction to grant the relief petitioner seeks.

Prior to July 25, 1967, petitioner held an off-sale general license for the sale of alcoholic beverages on the premises at 6656 Sunset Boulevard in Los Angeles. On July 31, 1967, the lease for the premises expired and the landlord refused to renew the lease. Accordingly, on July 25, as required by California Administrative Code, title 4, rule 65(a), petitioner surrendered its license to the department.

Rule 65(d), California Administrative Code, title 4, reads: "Any license voluntarily surrendered under subsection (a) of this rule shall be cancelled if it is not transferred to another person or for use at another premises, or redelivered and the licensed activity resumed, within six months from the date of such surrender unless the period is extended by action of the

department." Under this rule the license was subject to cancellation at any time after January 25, 1968. By the declaration of the principal counsel for the department filed February 21, 1968, one week before oral argument, we were informed that the department "has not extended the surrender [sic] period as to said license," and that "the Department, in light of the pending litigation in the above-entitled matter, intends to retain the status quo as to said license during the pendency of said litigation before the Court of Appeal of the State of California, Second Appellate District, Division One."

On December 13, 1967, petitioner opened an escrow for the sale of its license to one Pellerin to conduct a liquor business in Covina. On the same day, by letter, petitioner requested the department pursuant to rule 65(d) to extend the time for cancellation of the license for a period of ninety days from January 6, 1968, in order to allow the proposed sale to take place and afford the department an opportunity to consent to the transfer. On December 21 the department informed petitioner by letter that its request for extension of the time for cancellation "is denied. We must also remind you that a license cannot transfer to other persons while there are pending accusations against the license. We must further caution you that licenses surrendered pursuant to Rule 65 must be reactivated prior to the termination of the six (6) month period provided or be subject to cancellation." On January 9, 1968, when the present petition was filed three matters were pending before the Alcoholic Beverage Control Appeals Board;

(1) the department's decision of July 28, 1966, ordering the license suspended for ninety days; (2) the department's decision of July 1, 1966, ordering the license revoked; and (3) the department's decision of October 9, 1967, ordering the license revoked.

The petition now before us was filed January 9, 1968. One week before that, on January 2, 1968, petitioner sought and obtained an alternative writ of mandate and a stay order from the Superior Court for Los Angeles County in action number 924160, entitled Samson Market Company v. Kirby, basing its petition therein on the facts alleged in the petition herein. That alternative writ was returnable before the superior court on January 22, 1968. We have been advised by the Attorney General that on February 5, 1968, that proceeding was placed off calendar for lack of jurisdiction, the court having been informed of the pendency of this proceeding. On January 19, 1968, petitioner again requested the department to extend the time for the cancellation of the license until the pending accusations against the license were resolved, or until the department consented to a transfer of the license to a third party. By letter dated January 30, 1968, petitioner was advised by the department that it would not grant the extension.

The primary question raised by the pleadings goes to the jurisdiction of this court. The question arises by reason of the provisions of section 23090. 5 of the Business and Professions Code enacted in 1967, which became effective

November 8 in that year. Unless otherwise indicated, all code references in this opinion are to the relevant sections of the Business and Professions Code. [1] Petitioner here seeks a

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1 It is apparent from the record that petitioner filed its action in the superior court and its petition in this court because it was in doubt as to which court had jurisdiction to grant the relief which it sought. It is equally apparent that the Attorney General, appearing on behalf of the respondents, has also had some doubt as to which court has jurisdiction. In his initial points and authorities filed in support of the answer to the petition, the Attorney General says: "Respondents are in agreement with the position taken by appellant [petitioner] respecting jurisdiction to hear this case. Respondents believe that the additions to the Business and Professions Code respecting judicial review of decisions of the Alcholic Beverage Control Appeals Board (Bus. & Prof. Code §§ 23090-23090.7) were intended only to apply to decisions of a judicial nature after a formal hearing and not to ministerial acts reviewable by ordinary mandamus under section 1085 of the Code of Civil Procedure or to actions in the nature of declaratory relief to test the validity of an administrative regulation under section 1060 of the Code of Civil Procedure or section 11440 of the Government Code." In his supplemental points and authorities filed a month later the Attorney General states that "After further consideration of the authorities, respondents feel compelled to reverse [its] position insofar as interpretation of section 23090.5 is concerned."

writ of mandate to compel the director to grant an extension of time under rule 65 within which the license may be cancelled. Both parties agree that the issues framed by the pleadings will not justify the issuance of a writ of review under section 23090, but that any relief which may be granted can only be by a writ of mandate.[2] Petitioner earnestly contends that such relief may be granted by this court under the provisions of section 23090. 5.

Section 23090. 5 reads: "No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm,

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2 As the Attorney General points out in his supplemental points and authorities: "[A] writ of review, or writ of certiorari, may be issued only to review judicial functions. Witkin, Procedure, p. 2491; Standard Oil Co. v. State Board of Equalization, 6 Cal. 2d 557, 559 (1936); Department of Public Works v. Superior Court, 197 Cal. 215, 221 (1925); Cf. Camron v. Kenfield, 57 Cal. 550, 554 (1881). Admittedly, the Department of Alcoholic Beverage Control is vested with limited judicial power by Article XX, section 22, of the Constitution. Covert v. State Board of Equalization, 29 Cal. 2d 125, 131 (1946). However, the petition is not concerned with a judicial decision of the department." (See also Quinchard v. Board of Trustees, 113 Cal. 664, 668-671; Martin v. Alcoholic Bev. etc. Appeals Bd., 52 Cal. 2d 238; Reimel v. Alcoholic Bev. Control App. Bd., 255 A. C. A. 60, 63.)

reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case." This section is a part of Article 5 of Chapter 1.5, Division 9 of the Business and Professions Code relating to the administration of the Department of Alcoholic Beverage Control. Article 5 was added to the code in its entirety in 1967.

As we have seen, sections 23090 through 23090.4 establish a new procedure for the review of "a final order of the board" in a case involving the exercise of the limited judicial powers of the department. We conclude, therefore, that in enacting section 23090.5, the Legislature did not intend to establish an alternative procedure for judicial review of such orders or decisions even though section 23090.5 relates to the power of the courts to "review, affirm, reverse, correct, or annul any order . . . or decision of the department.". As we read section 23090.5, the Legislature intended thereby to provide for judicial review of the orders, rules or decisions or other acts of the department in the performance of its duties when acting in its administrative rather than in its limited judicial capacity. As to such matters the section provides that "a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

Although we have no recorded legislative history of sections 23090 through 23090.7, it

appears, as pointed out by the Attorney General, that the language of sections 23090 through 23096 was based on the provisions of sections 5950 through 5956 of the Labor Code relating to judicial review of orders, decisions, etc., of the Workmen's Compensation Appeals Board. Thus, section 5950 of the Labor Code provides for a writ of review to be issued by the Supreme Court or the appropriate court of appeal "for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or the order, decision, or award following reconsideration" by the Workmen's Compensation Appeals Board. This, of course, is comparable to the provisions of section 23090 of the Business and Professions Code. Section 5955 of the Labor Code as amended in 1967 (Stats. 1967, ch. 17, § 104) reads: "No court of this State, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or [a]ward of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases." In Loustalot v. Superior Court, 30 Cal. 2d 905, the court said (p. 911) that the legislative history of section 5955 of the Labor Code "shows without question that section 67 of the Public Utilities Act provided the model for section 5955 and that the decisions interpreting section 67 are likewise

applicable thereto." [3] Similarly the decisions interpreting section 5955 of the Labor Code are applicable in interpreting section 23090.5 of the Business and Professions Code.

In Loustalot v. Superior Court, supra, 30 Cal. 2d at pp. 911-912, the court, after reviewing the decisions interpreting section 67 of the former Public Utilities Act, said: "It is thus settled that a superior court has 'no jurisdiction directly or indirectly to overrule an order of the railroad commission. The power to reverse, review, correct or annul orders of that commission rests solely in the Supreme Court (sec. 67 of the Public Utilities Act, supra) and the superior court is without jurisdiction in the premises.' (Wallace Ranch W. Co. v. Foothill

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3 Section 67 of the Public Utilities Act of 1911 (Stats. Ex. Sess. 1911, p. 55; reenacted in Stats. 1915, p. 161) to which the court referred in Loustalot v. Superior Court, 30 Cal. 2d 905, reads: "No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided that the writ of mandamus shall lie from the supreme court to the commission in all proper cases." The provisions of section 67 of the former Public Utilities Act are now found in Public Utilities Code, section 1759.

D. Co., supra, at 121.) 'Even though the order by the railroad commission be palpably erroneous in point of law, until some order by the Supreme Court may be issued to the contrary, the original order of the commission must stand as a proper and legal order in the premises.... Such being the state of the law, it would follow that, as is provided by the act itself, the only relief which the aggrieved party may have from such an order is by or through a writ issued by the Supreme Court.' (People v. Hadley, supra, at 375.)" Likewise, continued the court, "an order of the Industrial Accident Commission, even though erroneous, may not be reviewed or annulled by the superior court and must stand as a proper and legal order until reversed by this court or a District Court of Appeal. The only relief afforded the aggrieved party is a writ by this court or a District Court of Appeal."

Specifically the court held in Loustalot that, by reason of the provisions of section 5955 of the Labor Code, the superior court did not have jurisdiction in a habeas proceeding to review a decision of the Industrial Accident Commission adjudging a party guilty of contempt of the commission. "By granting a petition for habeas corpus, the superior court clearly interferes with the operation of the commission's order. Moreover, if the superior court discharged defendant, that decision would have the effect of annulling the commission's order. . . . Certainly, the superior courts were not meant to have jurisdiction to determine finally the legality of such an order. Any such interference with an order of the commission must be considered

an 'encumbrance' on the administration of the workmen's compensation laws, within the power of the Legislature to prohibit. The defendant, if unlawfully imprisoned, is not denied an adequate remedy, but must seek relief in an appellate court having jurisdiction to review or annul the order in question." In Greitz v. Sivachenko, 152 Cal. App. 2d 849, the court followed Loustalot in holding that the superior court had no jurisdiction to stay the entry of judgment by the clerk of the superior court upon an award of the Industrial Accident Commission pursuant to section 5806 of the Labor Code.

The decision in Loustalot was also followed in Pacific Tel. & Tel. Co. v. Superior Court, 60 Cal. 2d 426, in holding that by reason of section 1759 of the Public Utilities Code the superior court does not have any jurisdiction to pass upon the validity or reasonableness of decisions of the Public Utilities Commission. In that case the commission, without a hearing, had disconnected a subscriber's telephones, purporting to act on an earlier decision prescribing rules relating to the discontinuance of telephone service when it had cause to believe that the service was being used as an instrumentality to violate or to aid and abet the violation of law. (See also People v. Superior Court, 62 Cal. 2d 515, where the court held that section 1759 of the Public Utilities Code precludes the superior court from adjudicating the very issues that would necessarily be presented to the commission in certain proceedings then pending before it.)

We conclude that, by reason of section 23090.5 of the Business and Professions Code, this court has jurisdiction to grant the relief petitioner seeks by a writ of mandate, and that the superior court has no jurisdiction to grant such relief. We turn, then, to a consideration of the petition on the merits.

Petitioner earnestly contends that a cancellation of its license pursuant to rule 65(d) would be unconstitutional and in excess of the department's jurisdiction. No authorities are cited in support of this contention.

There is no merit in petitioner's contention. The power of the department to adopt a rule such as rule 65 is derived from Article XX, section 22, of the Constitution and section 25750 of the Business and Professions Code. The power of the department to adopt rules such as rule 65 and to interpret them cannot be questioned, so long as the agency, under the guise of its rule making power, does not abridge or enlarge its authority or exceed the powers given to it by the statute. (California Drive-In Restaurant Assn. v. Clark, 22 Cal. 2d 287; Joseph George, Distr. v. Dept. Alc. Control, 149 Cal. App. 2d 702, 706-707.) As the court said in Bank of Italy v. Johnson, 200 Cal. 1, 20, quoted with approval in California Drive-In Restaurant Assn. v. Clark, supra, at page 303, "the authority of an administrative board or officer, . . . to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is

implied from the power granted." [4]

In adopting rule 65 the department did not exceed the powers given to it by Article XX, section 22; of the Constitution, or by section 25750 of the code, nor did it thereby seek to abridge or enlarge its authority. In our opinion rule 65 is constitutional.

Petitioner further contends that in failing to grant an extension of time within which its license may be cancelled under rule 65(d), and in refusing to consent to a transfer of the license to a bona fide purchaser while several disciplinary actions are pending against the license, the department has acted in a capricious, unjust and arbitrary manner since, without cause or justification, petitioner's license will be revoked and cancelled without any fault on its part. Petitioner acknowledges that, as of the time it filed its petition, three disciplinary actions were pending before the department.

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4 See also Business and Professions Code, section 23820, which authorizes the department to "make all rules consistent with the provisions of Section 22 of Article XX of the Constitution, or the provisions of this division, necessary to carry into effect the provisions of this article [§§ 23815-23825, limiting the number of licensed premises], and to restrict the issuance of alcoholic beverage licenses, ... to such number in any county as the department shall determine is in the interest of public welfare and morals, convenience, or necessity."

If, says petitioner, it "awaits the results of the pending accusations, and if petitioner is successful in the pending accusations, its victory will be a hollow victory since petitioner will no longer have a license." (Petn. p. 6, lines 8-11.)

The controlling facts are summarized at the outset of this opinion. We find nothing in the showing made by petitioner to support its contention. In deciding whether a particular application with respect to a liquor license should be granted, the department has been granted a broad range of power and discretion. In such cases "The courts will permit the Department to work out its problems with as little judicial interference as possible, and an abuse of discretion must appear very clearly before the courts will interfere. (Martin v. Alcoholic Beverage etc. Appeals Board, 52 Cal. 238, at p. 248 [340 P. 2d 1].)" (Harris v. Alcoholic Bev. etc. Appeals Board, 238 Cal. App. 2d 24, 28.) The petitioner here has not made out a case for judicial interference with the decisions of the department of which it complains.

The petition for a peremptory writ of mandate is denied.

McCOY, J. *

We concur:

WOOD, P. J.

LILLIE, J.

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* Retired Judge of the Superior Court sitting under assignment by the Chairman of the Judicial Council.

Office-Supreme Court, U.S.
FILED
AUG 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 326

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Appellees.

Appeal From the Decision of the Court of Appeal of the State of California, Second Appellate District, Division One, 2d Civil No. 32647 and of the Decision of the California Supreme Court.

MOTION TO AFFIRM OR DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 326

SAMSON MARKET COMPANY, INC., a California corporation,

Appellant,

vs.

EDWARD J. KIRBY, Director of the Department of Alcoholic Beverage Control of the State of California,

Appellees.

Appeal From the Decision of the Court of Appeal of the State of California, Second Appellate District, Division One, 2d Civil No. 32647 and of the Decision of the California Supreme Court.

MOTION TO AFFIRM OR DISMISS.

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal filed herein be dismissed and that the final judgment of the Court of Appeal of the State of California be affirmed on the grounds that the case does not present any substantial federal questions and upon the further ground that the appeal, in part, is not within the jurisdiction of the court.

Statement of the Case.

Appellees accept as accurate the statement of facts contained in the jurisdictional statement and in the opinion of the Court of Appeal of the State of California in 2d Civil No. 32647, 261 A.C.A. 659, 68 Cal. Rptr. 130 (1968).

Questions Presented.

1. Do the provisions of Rule 65 of the California Department of Alcoholic Beverage Control respecting the surrender and cancellation of inactive licenses violate due process?

2. Under the circumstances of this case was it a violation of due process for the California Department of Alcoholic Beverage Control to refuse to indefinitely extend appellant's inactive license to sell alcoholic beverages?

ARGUMENT.

I.

The Provisions of Rule 65 of the Department of Alcoholic Beverage Control Respecting the Surrender and Cancellation of Inactive Licenses Do Not Violate Due Process.

A. The Department Was Acting Within the Authority Vested in It by California Law in Enacting Rule 65.

The rule which is the subject of the instant appeal is an administrative regulation adopted by the California Department of Alcoholic Beverage Control pursuant to the authority vested in it by article XX, section 22 of the California Constitution. Appellant suggests that Rule 65 is not properly founded upon any authority vested in the department. However, the question of the department's authority under state law is not a federal question and the existence of the department's authority to enact the rule would appear to be settled by the decision of the Court of Appeal. Moreover, in an earlier case the California Court of Appeal had approved Rule 65 as a reasonable exercise of the department's rule-making authority. *Joseph George, Distr. v. Dept. Alc. Control,* 149 Cal. App. 2d 702, 705; 308 P. 2d 773 (1957).

B. Rule 65 Does Not Grant Unfettered Power to the Department to Cancel an Alcoholic Beverage License Without Cause or Justification.

In making its claim that Rule 65 authorizes the department to cancel its license without cause or justification petitioner seems to ignore the fact that the pro-

visions of the rule itself would be cause for cancellation of its license provided that the rule is not so arbitrary or discriminatory as to violate due process. *Williamson v. Lee Optical Co.,* 348 U.S. 483, 486-88 (1955); *Securities Comm'n v. Chenery Corp.,* 332 U.S. 194, 207 (1947).

The principle embodied by Rule 65 is that an alcoholic beverage license may not be retained in an inactive state but must remain associated with a bona fide business. The need for the rule results from the two principle characteristics of alcoholic beverage licenses in California; their transferability and their limitation in numbers. Alcoholic beverage licenses are issued to a particular person to do business at a particular place. Cal. Bus. & Prof. Code § 24040. Both the applicant and the place at which he does business must qualify for the license. *Cf. Koss v. Dept. Alcoholic Beverage Control,* 215 Cal. App. 2d 489; 30 Cal. Rptr. 219 (1963) [qualification of place]; *Jack P. Meyers, Inc. v. Alcoholic Bev. etc. Appeals Bd.,* 238 Cal. App. 2d 869, 48 Cal. Rptr. 259 (1965) [qualification of person]. Also, some licenses are limited in number. For example, appellant possesses an off-sale general license, which permits the retail sale of all types of alcoholic beverages. The number of such licenses which may be issued is strictly limited to one for every 2,500 people in each county. Cal. Bus. & Prof. Code § 23817. The number of new licenses which may be issued in any one year to allow for population increase is limited to 10% of the

outstanding licenses or 25, whichever is less. Cal. Bus. & Prof. Code § 24070(b).

As the result of the limitation of the number of licenses which may be issued, it is of utmost importance to keep all licenses attached to an active business, for every inactive license deprives a potential licensee of the chance to enter the alcoholic beverage business. Thus, quite apart from Rule 65, the California courts have held that a license which is not associated with an active business may be revoked upon the Constitutional grounds that its continuance would be contrary to public welfare or morals. *Gore v. Harris,* 229 Cal. App. 2d 821, 825-28; 40 Cal. Rptr. 666 (1964).

Rule 65 mitigates the effect of the general rule permitting revocation of an inactive license since it grants extra time to a licensee in which to make arrangements for the disposal or reactivation of his business. It also assures the department of the location and proper custody of the license and avoids the need to immediately proceed to revoke the license by accusation. Subparagraph (d) of Rule 65 expresses the department's reasonable judgment that a licensee should be able to reactivate a license within six months and that a further delay, in the absence of special justification, would unnecessarily restrict the freedom of entry of other applicants for a license.

C. Due Process Does Not Require That the Department Hold a Hearing Prior to Cancelling an Inactive License Which Has Been in Its Custody for Six Months Pursuant to Rule 65.

At the outset it must be observed that the appellant has not at any stage of these proceedings requested the department to grant it a hearing nor has it requested the California courts to order the department to grant it a hearing.

Not every act of an administrative agency respecting the issuance or cancellation of a license must be based upon an administrative hearing. For example, no hearing is required to deny a license when an applicant has failed to pass an examination or to cancel a license which has not been renewed. An evidentiary hearing is required only when there are factual issues to be resolved. *Sun Oil Company v. Federal Power Commission,* 256 F. 2d 233, 240-41 (5th Cir., 1958), *cert. denied;* Davis, *Administrative Law Treatise,* §§ 7.01-7.03. Within the ordinary context of Rule 65(d) the existence of any disputable fact is completely impossible. The only fact with which a cancellation under Rule 65(d) is concerned is the continuous inactivity of a license for a period of six months. With respect to a license which has already been surrendered to the custody of the department and remained in the department's custody for a period of six months, as in the instant case, there can be no factual dispute that the conditions of the rule have been met. Moreover, the licensee is assured of notice of the department's action since he has already voluntarily surrendered his license pursuant to subparagraph (a) of Rule 65 with knowledge of the rule's provisions.

II.

It Was Not a Denial of Due Process for the Department to Refuse to Indefinitely Extend the Time During Which Appellant Could Retain Its Inactive License.

A. This Issue Is Not Within the Court's Appellate Jurisdiction Under 28 U.S.C. § 1257(2).

The second of the "questions presented" in the jurisdictional statement asks,

> "Was the refusal of the Department to extend the period of time on which to cancel the license so arbitrary and capricious as to amount tm a denial of property without due process of law?"

The appellate jurisdiction of the court under 28 U.S.C. § 1257(2) is limited to cases in which the Constitutionality of a state statute has been sustained. Clearly, the second "question presented" in the jurisdictional statement does not involve the Constitutional validity of Rule 65. Therefore, it should be treated as though it were contained in a petition for writ of certiorari. 28 U.S.C. § 2103.

B. The Department of Alcoholic Beverage Control Did Not Act Arbitrarily or Discriminatorily in Refusing to Indefinitely Extend Appellant's Inactive License Merely Because Such Refusal Might Render Moot Pending Appeals by Appellant From Other Decisions of the Department Revoking Its License.

The heart of the instant case involves appellant's claim that cancellation of its license under Rule 65(d) will render moot three pending appeals from orders suspending and revoking appellant's license. The essence of appellant's argument is that the United States

Constitution compels the department to permit appellant to retain its inactive license until the pending cases have been finally resolved or, in the alternative, to permit appellant to transfer its license to a third party.

The Constitution does not compel the department to permit appellant to indefinitely retain its license in an inactive state merely because there are pending appeals from orders revoking appellant's license. Such a right to an indefinite extension does not exist in behalf of licensees who are not involved in pending disciplinary proceeedings. *Joseph George, Distr. v. Dept. Alc. Control,* 149 Cal. App. 2d 702, 308 P. 2d 773 (1957). Appellant does not advance any reason why it should be accorded a privilege not available to those whose license is free of disciplinary action.

The question before the court is whether the department's refusal to indefinitely extend appellant's inactive license was so arbitrary or capricious as to amount to a denial of due process. On the contrary, it appears that the granting of appellant's request would amount to a denial of equal protection to those inactive licensees against whom disciplinary action is not pending. Under the circumstances the department's refusal to indefinitely extend appellant's license cannot be deemed arbitrary or capricious.

It must be remembered that there is no connection between cancellation of appellant's license under Rule 65(d) and the outstanding orders of revocation pending against its license. There has been no claim by appellant that Rule 65(d) is being enforced against it any differently than against any other licensee. Unless the time for cancellation of a license is extended, cancella-

tion under Rule 65(d) is a ministerial and automatic act, akin to cancellation of a license for failure to pay an annual renewal fee. No one would suggest that a licensee is entitled to maintain a license in effect without payment of required fees or compliance with other basic requirements merely because there are outstanding disciplinary proceedings against its license which have not yet completed their circuit through the appellate courts.

The department was also not required by the United States Constitution to indefinitely extend appellant's inactive license until transferred to another party for the reason that the department is not compelled to permit such a transfer. In its letter to petitioner of December 21, 1967, the department informed appellant that a license may not be transferred to another person while there are pending accusations against it. Although the statement in the letter does reflect the policy of the department, it must be observed that in the instant case appellant never made a formal request for transfer of the license and the department was never called upon to formally approve or deny such a request.

The department's policy against transfer of licenses against which accusations are pending is based upon its inherent right to retain jurisdiction over the license and the licensee so long as the license exists and the case is pending. Appellant states that denial of his request will deny him the possible fruits of an appellate victory with respect to the pending accusation. On the other hand, if the department were required to permit a transfer to a third party while an accusation were pending it would be deprived of its right to impose disciplinary action against appellant, and any licensee

could avoid the threat of disciplinary action by merely transferring his license. Under California law a pending order of disciplinary action follows a transferred license and once the disciplinary action becomes final the penalty must be imposed against the transferee. *Maxwell Cafe v. Dept. Alcoholic Control,* 142 Cal. App. 2d 73, 80; 298 P. 2d 64 (1956). Surely no one is going to pay $17,000 for a license which is subject to revocation. In practice licenses against which disciplinary actions are pending could be transferred only if the department would be willing to dismiss the charges. Then if the transferor were to seek a new license the department would be compelled to reopen the case, perhaps at a time when the evidence had become stale.

In view of these considerations the refusal of the department to indefinitely extend appellant's license until the pending disciplinary action becomes final or until the license has been transferred cannot be said to be so arbitrary and capricious as to constitute a violation of due process.

C. In Denying Appellant's Request to Indefinitely Extend Its Inactive License the Department Was Not Required to Prove by Evidence That Such an Extension Would Be Contrary to Public Welfare or Morals.

Appellant argues that it should have been given an opportunity to defend itself in a hearing and the department should be required to prove that continuance of its license would be contrary to public welfare and morals. As we have already observed appellant has never requested a hearing either from the department or from the courts. We have further already observed that a hearing is not required prior to cancella-

tion of a license under Rule 65(d) since there are no disputable facts to be resolved. Under California law continuance of a license which has been surrendered to the custory of the department for a period of six months is contrary to public welfare or morals as a matter of law. There is no charge to refute and no answer to be heard.

The question of whether appellant is entitled to a hearing on its request for extension of its inactive license is a separate one. Here again appellant has never requested a hearing from the department or from the court. And, as we have already observed, appellant did not base its request for an extension upon any disputed factual assertions. Thus, no evidentiary hearing would be required.

It would appear that the party seeking an exception to a general rule ought to be the one to bear the burden of proof as to whether the exception should be granted. However, within the context of the instant case the question is moot since no hearing was requested and there were no factual issues to be resolved.

D. Appellant Did Not Fall Into a Trap Set for It by the Department When It Voluntarily Surrendered Its License Under Rule 65(a).

In the closing paragraph of its brief appellant states,

> ". . . To lose its license on the basis of the trap it fell into by surrendering its license is unjust. . . ."

However, there is nothing in the record in this case to indicate that appellant was trapped or tricked by the department into surrendering its license.

Appellant has never claimed that it was unaware of the provisions of Rule 65(d) respecting cancellation of licenses at the time that it voluntarily surrendered its license to the custody of the department under Rule 65(a) nor has appellant claimed that it was unaware of the department's policy respecting transfer of licenses against which disciplinary action is pending. Appellant has been represented by competent and experienced counsel at all stages of the proceedings which are subject of this case and any speculation that it was the victim of ignorance or stealth seems quite unwarranted.

Moreover, appellant has not been prejudiced by voluntarily surrendering its license to the custody of the department. Had appellant failed to voluntarily surrender its license the department could have proceeded to revoke the license by accusation. In such an eventuality appellant would have lost its right to reinstate the license by renegotiating its lease or by acquiring a new premises within six months.

Conclusion.

For the reasons stated hereinabove, the issues raised by appellant in its jurisdictional statement raised no substantial federal question and, in part are not the subject of the court's appellate jurisdiction. Therefore, the appeal should be dismissed and, in the alternative, a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SAMSON MARKET CO., INC. *v.* KIRBY.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 326. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.